Appellate Review Of MERC Cases

(February 2003 through February 2004)

Roy L. Roulhac
Administrative Law Judge[1]
Michigan Employment Relations Commission

Unfair Labor Practice Charges

Capitol City Lodge No. 141 v Ingham County Board of Commissioners and Ingham County Sheriff, Court of Appeals No. 233838, issued February 7, 2003, affirming the Commission's decision at 2001 MERC Lab Op 96. In an unpublished opinion, the Court of Appeals affirmed MERC's order requiring respondents, Ingham County Board of Commissioners and Ingham County Sheriff, to cease and desist making changes in their light-duty policy without first bargaining and to restore the light-duty policy that was in effect before respondents made unilateral changes.

The Court rejected arguments that light-duty assignments were not mandatory subjects of bargaining and that the parties' collective bargaining agreement granted the sheriff the exclusive right to determine job assignments. The Court found that the agreement was silent regarding any light-duty policy and that the parties' acceptance of and adherence to the past practice modified the parties' contract language. Accordingly, the Court affirmed MERC's conclusion that the union did not waive its rights regarding the light-duty policy.

Michael J. Garcia v Eaton Rapids Education Association and Michigan Education Association, Court of Appeals No. 234584, issued May 27, 2003, affirming the Commission's decision at 2001 MERC Lab Op 131. In an unpublished opinion, the Court of Appeals affirmed MERC's order granting summary disposition in favor of respondents, Eaton Rapids Education Association and Michigan Education Association, and dismissing charging party's claims of breach of duty of fair representation and various constitutional violations. Additionally, the Court of Appeals found that charging party's assertions that MERC committed various procedural errors were without merit. Rejected were arguments that MERC erred in denying his request for further oral argument after his hearing before the ALJ; MERC erred by not affording him special consideration with regard to informing him of his procedural rights because of his *pro se* status; his due process rights were violated because the hearing only lasted one hour; and that MERC lacked authority to grant summary disposition and dismiss his claim.

The Supreme Court denied leave to appeal on January 9, 2004

City of Lansing v Carl Schlegel, Inc. and Associated Builders and Contractors of Michigan, Court of Appeals No. 238839, issued July 24, 2003, affirming the Commission's decision at 2001 MERC Lab Op 403. In a published opinion, the Michigan Court of Appeals affirmed MERC's decision dismissing the charge for lack of subject matter jurisdiction. The Court held that PERA did not govern the dispute because charging parties, Carl Schlegel, Inc. and Associated Builders and Contractors of Michigan, were not

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public employees and PERA does not address the legality of construction project labor agreements.

This case is currently on appeal to the Michigan Supreme Court.

Supervisors Association of Engineers v Pontiac School District, Court of Appeals No. 239835, issued September 2, 2003, affirming the Commission's decision at 2002 MERC Lab Op 20. In an unpublished opinion, the Court of Appeals affirmed MERC's order dismissing the union's unfair labor practice charge that alleged that the employer refused to bargain with the union and unilaterally increased the duties of the engineers represented by the union, by requiring them to take on additional cleaning duties. The Court also agreed with the Commission's finding that there was no demand to bargain by the Union.

The court agreed with MERC that the employer had no obligation to bargain before expanding the engineers' cleaning duties because the plan to clean classrooms on a daily basis had no effect on the engineers' hours, wages, or benefits. The cleaning was already part of the engineers' duties and the increase in cleaning simply meant that they might be unable to complete some of their other maintenance responsibilities.

Branch County Board of Commissioners, Branch County Clerk, Register of Deeds, and Treasurer v International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, Court of Appeals No. 241189, issued December 23, 2003, affirming in part and reversing in part the Commission's decision at 2002 MERC Lab Op 110. In a published decision, the Court of Appeals affirmed MERC's dismissal of unfair labor practice charges alleging that the Branch County Clerk and Treasurer failed to bargain in good faith by asserting co-employer status with Branch County.

The Court of Appeals concurred with MERC that MCL 50.63 allows the county clerk to hire and discharge any of her deputies. The Court also agreed with MERC that MCL 48.37 permits the county treasurer to appoint and remove all deputies in the treasurer's office. Thus, the Court held that the county clerk and treasurer are co-employers because they have the statutory authority to hire and discharge all of their employees. However, the Court found that because the register of deeds does not have the authority to hire and discharge all of his or her employees, he or she is not a co-employer. The Court did not consider the issue of whether the register of deeds failed to bargain in good faith.

Southfield Education Association, Southfield Public Schools Michigan Education Support Personnel association and Educational Secretaries v Southfield Public Schools, Court of Appeals No. 240050, issued February 9, 2004, affirming the Commission's decision at 2002 MERC Lab Op 53. In an unpublished decision, the Court of Appeals affirmed MERC's dismissal of an unfair labor practice charge alleging a violation of the duty to bargain in good faith by enforcing leave policies in the parties' collective bargaining agreement and thereby deviating from the permissive leave policy it had previously applied. MERC held that the employer's announcement that it would begin to exercise its discretion when granting leaves of absences did not violate PERA. The Commission also dismissed a claim that the employer engaged in direct dealing by sending a memo directly to employees regarding the policy.

The Court, in affirming the Commission's decision, noted that the employers past practice of granting all leave requests did not necessarily conflict with the contract terms that unambiguously gave it discretion to grant or deny leave requests. Even assuming that the

practice was contrary to the contract, the Court found no evidence that the employer intended to modify that term. The Court stated that "[T]o establish that a past practice modified the contract, a party must show that both contracting parties had a 'meeting of the minds' with respect to the changes and specifically intended that the practice would replace the agreed upon term." *Id*. at 329. The Court distinguished *Detroit Police Officers Ass'n v* Detroit, 452 Mich 339 (1996), where substantial evidence was presented to show that the parties intended past practice to constitute an amendment to the contract.

Representation Cases

Wayne County Airport Police Department and Service Employees International Union Local 502 -and- Wayne County Police Association, Court of Appeals No. 235669, issued February 14, 2003, affirming the Commission's decision at 2001 MERC Lab Op 163. In an unpublished opinion, the Court of Appeals affirmed MERC's decision dismissing the petition of the Wayne County Police Association seeking to represent airport police employed by respondent, Wayne County Airport Police Department. The airport police were part of an existing bargaining unit represented by the incumbent union, Service Employees International Union, Local 502.

Petitioner contended that the airport police are Act 312 eligible and that their bargaining unit included Act 312 eligible and non-eligible employees. Petitioner argued that MERC erred by refusing to conduct a representation election to permit the airport police to decide whether to sever from the mixed unit.

The Court pointed out that MERC places a heavy burden on parties seeking to disturb an established bargaining unit and has determined that it will only break up an established unit where the unit is per se inappropriate or where an extreme divergence in community of interest is present. The Court also noted that MERC has held that Act 312 employees should be in bargaining units separate from those of non-Act 312 employees, although MERC does not require the severance of existing bargaining units containing both Act 312 and non-Act 312 employees. Accordingly, it would not be per se inappropriate for Act 312 employees to be in a bargaining unit with employees who are not Act 312 eligible.

Ferris Faculty Association v Ferris State University, Court of Appeals N. 243885, issued January 27, 2004, affirming the Commission's decision at 2002 MERC Lab Op ___. In an unpublished decision, the Court affirmed MERC's decision to deny the union's petition to add the full-time faculty at Kendall College of Art and Design at Ferris State University to the collective bargaining unit of full-rime faculty at Ferris State University (FSU).

The Court noted that Kendall is technically a sub-unit within FSU, with FSU having the power to make changes at Kendall. However, the Court found that based Kendall's autonomous character, evidenced by the lack of interaction between the faculties and of Kendall's separate academic governance, there was competent, material and substantial evidence to support MERC's finding that Kendall's existing bargaining unit was appropriated. The Court disagreed with the union's assertion that the Commission should not have considered the bargaining history of the unit at Kendall.